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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1957

No. 1016

BENJAMIN J. RUDIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX

Subject Index

	Page
Petition	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Concise Statement of the Case	3
Jurisdiction in Court of First Instance	4
Reasons for Granting the Writ	4
Conclusion	5
Appendix	6

Table of Cases and Authorities Cited

Winslow v. *United States*, 216 Fed. 2d. 912, C. A. 9th	5

Statutes and Authorities Cited

U. S. Code, Title 18:

Section 152, Chapter 9	2
Section 1334	4
Section 3231, Chapter 211	4
Section 3282, Chapter 213	2, 5
Section 3284	3, 4, 5

U. S. Code, Title 11:

Section 32	3
Section 32(a)	4, 5

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Benjamin J. Rudin prays for issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing a decision of that Court affirming on April 19, 1958, the verdict of conviction of petitioner on November 2, 1956, and the sentence thereon on February 15, 1957, in the United States District Court for the Eastern District of Michigan, Southern Division.

Opinion Below

The opinion of the Court of Appeals, set forth in the Appendix infra, p. 14, has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1958 (App. Infra, p. 14). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether an indictment filed on March 10, 1953, which charged petitioner with the offense of having concealed assets belonging to the bankrupt corporation, Detroit Central Wholesale Grocery Company, from the Trustee in Bankruptcy that was appointed following the adjudication of bankruptcy on January 27, 1950, which said Trustee duly qualified by filing his bond on March 4, 1950, was found within the three-year period of the statute of limitations. Said concealment being alleged to have been committed on or about March 16, 1950.

Statutes Involved

Section 152, Chapter 9, Bankruptcy, Title 18, U. S. C., provides:

> "Whoever knowingly and fradulently conceals from the receiver, custodian, trustee, marshal, or other officer of the Court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt * * * shall be fined * * *."

Section 3282 of Chapter 213, Limitations, Title 18, U. S. C.:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or

the information is instituted within three years next after such offense shall have been committed." c. 645, 62 Stat. 828.

Section 3284, Concealment of Bankrupt's Assets, Title 18, U. S. C.:

"The concealment of assets of a bankrupt or other debtor shall be deemed to be a continuing offense until the debtor shall have been finally discharged, or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge." c. 645, 62 Stat. 828.

Section 32, Bankruptcy Discharges, Title 11, U. S. C.:

"(a) The adjudication of any person, except a corporation, shall operate as an application for a discharge: provided, that the bankrupt may, before the hearing on such application, waive, by writing filed with the Court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the Court in which the proceedings are pending." c. 579, par. 6, 66 Stat. 422.

Concise Statement of the Case

The Detroit Central Wholesale Grocery Company a Michigan corporation, was adjudicated a bankrupt in the District Court at Detroit, Michigan, on January 27, 1950, the Trustee was thereafter appointed on March 1, 1950, and duly qualified on March 4, 1950, at which time he filed his bond.

On March 10, 1953, or more than three years after the Trustee had been duly appointed and qualified, the indictment in this cause was returned, charging the petitioner with having concealed assets of the bankrupt from the Trustee on March 16, 1950. At no time was testimony ever offered establishing the commission of the alleged offense on March 16, 1950, or on any other specific date.

To this date, no application has ever been made on behalf of the corporation for the discharge in bankruptcy by any one entitled so to do. Petitioner was powerless to apply.

Jurisdiction in Court of First Instance

The jurisdiction of the District Court for the Eastern District of Michigan, Southern Division, is to be found in Section 1334, Bankruptcy Matters and Proceedings, Title 28, U. S. C., as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy."

Section 3231, Chapter 211, Jurisdiction and Venue, Title 18, U. S. C., which provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, on all offenses against the laws of the United States."

Reasons for Granting the Writ

The precise question here raised has never been settled by this Court.

If the rule with respect to the running of the statute of limitations is as contended by respondent, then that construction of the statutes involved prevents forever the application of the statute of limitations for the prosecution of offenses of the nature here involved.

Section 3284, Title 18, U. S. C., supra, makes the concealment of the assets of a bankrupt a continuing offense, and specifically provides that the period of limitation shall not begin to run until final discharge, or the denial of the discharge of the bankrupt.

Section 32(a), Title 11, U. S. C., with respect to corporations, provides only that an application for discharge may be filed within six months after its adjudication.

No such application was ever filed for or on behalf of the corporation, and the six-months period provided as above set forth had long since expired at the time of the finding of the indictment; thus, since petitioner was powerless to make such application the broad prohibition of Section 3284, supra, together with the deficiency of Section 32(a) supra, operate together to create the anomaly of denying to petitioner forever the benefit of Section 3282, Title 18, U. S. C., supra, to which he is entitled.

The Appeliate Court, in affirming the judgment, has read into Section 3284, Title 18, U. S. C., provisions that are contrary to its express terms, and has thereby concluded that the statute of limitations commences to run with the expiration of the time within which a corporation may apply for a discharge, irrespective of whether such application was made.

In relying on the case of *Winslow* vs. *United States*, 216 Fed. 2d. 91?, C. A. 9th, as authority for their action, the Appellate Court ignores the fact that Section 32(a), Title 11, U. S. C., as construed in the Winslow case, dealt only with that part of Section 32(a) that governs the discharge of individuals, and, as such, fixes a definite period for the beginning of the statute of limitations to run.

Conclusion

In view of the importance of the question involved, and the fact that the statutes involved have never been construed by this Court, and for the other reasons discussed in the petition, it is respectfully submitted that this petition be granted, and that a writ of certiorari issue as prayed.

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APPENDIX

Filed April 19, 1958. Carl W. Reuss, Clerk.

No. 13330

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BENJAMIN J. RUDIN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided April 19, 1958

Before MILLER and STEWART, Circuit Judges, and MATHES District Judge.

MILLER, Circuit Judge. Following trial by jury and a verdict of guilty, the appellant received a sentence of six months imprisonment for fraudulently concealing from the Trustee in Bankruptcy of the Detroit Central Wholesale Grocery Company certain cash and merchandise inventory which was property belonging to the estate of the bankrupt, in violation of Section 151, Title 18, U. S. Code. On this appeal he contends that the District Court erred (1) in denying his motion to dismiss the indictment, made prior to the trial of the case and renewed at the close of the Government's case, upon the grounds (a) that the statute of limitations had run prior to the return of the indictment and (b) that the indictment did not charge an offense within the purview of the statute, and (2) in denying his motion for judgment of acquittal, made at the conclusion of the Government's case, upon the grounds that the evidence was not sufficient to submit the case to the jury or to support a conviction.

The indictment, which was returned on March 10, 1953, charged that on or about March 16, 1950, the appellant did unlawfully and fraudulently conceal "from Orland H. Ellis, Trustee of Detroit Central Wholesale Grocery Company, a Michigan Corporation, cash in the amount of $66,013.07, and merchandise inventory consisting of miscellaneous groceries in the amount of $57,665.07, which were the property of said corporation; said defendant then being the President and Treasurer of said corporation and which said corporation was duly adjudicated a bankrupt on January 27, 1950, in the United States District Court in Detroit, Michigan; said Orland H. Ellis being appointed Trustee by Arthur A. Koscinski, District Judge, March 1, 1950, and becoming duly qualified by filing bond in the amount of $10,000.00 on March 4, 1950, ..."

The applicable statute of limitations is three years. Section 3282, Title 18, U. S. Code. Appellant contends that the statute of limitations commenced to run when the trustee qualified by filing the required bond on March 4, 1950, at which time the assets of the bankrupt estate were concealed from him, and that the indictment, having been returned on March 10, 1953, was beyond the three-year period.

Section 3284, Ttitle 18, U. S. Code, provides that the concealment of the assets of a bankrupt shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, "and the period of limitations shall not begin to run until such final discharge or denial of discharge." Section 32(a), Title 11, U. S. Code, provides that the adjudication of any person, except a corporation, shall operate as an application for a discharge and that a "corporation may, within six months after its adjudication, file an application for discharge in the court in which the proceedings are pending." The bankrupt corporation did not make an application for discharge in bankruptcy, nor was an order entered denying the bankrupt a discharge. The indictment alleges that the corporation was adjudicated a bankrupt on January 27, 1950. Accordingly, it had until July 27, 1950, to apply for its discharge. Computing the three-year statute of limitations from that date means that the indictment was re-

turned well within the required time. *Winslow* v. *United States*, 216 F. (2) 912, C. A. 9th.

In support of his contention that the indictment did not charge an offense within the purview of the statute, appellant points out that the indictment charges him with concealing from the Trustee in Bankruptcy of Detroit Central Wholesale Grocery Company, a Michigan Corporation, cash and merchandise "which were the property of said corporation" and that it failed to charge that the property concealed belonged to the estate of the bankrupt. Section 152, Title 18, U. S. Code, under which the indictment was brought, provides that whoever fraudulently conceals from the trustee in any bankruptcy proceeding "any property belonging to the estate of a bankrupt" shall be guilty of an offense. In other words, it is contended that the indictment charges that the concealed assets were the property of the corporation rather than that they belonged to the estate of the bankrupt. This contention disregards other allegations of the indictment, namely, that the defendant was "the President and Treasurer of said corporation and which said corporation was duly adjudicated a bankrupt on January 27, 1950 in the United States District Court in Detroit, Michigan."

It is, of course, settled law that in order for an indictment to be valid it must allege all of the elements which are necessary to constitute a violation of the statute. But it is not necessary that the indictment follow the exact wording of the statute. *Dunbar* v. *United States*, 156 U. S. 185, 190; *United States* v. *Marcus*, 166 F. (2) 497, 501, C. A. 3rd. The test of the sufficiency of an indictment is that it must sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, that the record show with accuracy to what extent he may plead a former acquittal or conviction. *Hagner* v. *United States*, 285 U. S. 427, 431; *Anderson* v. *United States*, 215 F. (2) 84, 86-87, C. A. 6th, cert. denied, *Lewis* v. *United States*, 348 U. S. 888, rehearing denied, 348 U. S. 922. As stated by the court in *United States* v. *Debrow*, 346 U. S. 374, 378, it is inconceivable to us how the defendant could possibly be misled

as to the offense with which he stood charged. Reading the indictment in its entirety, it is clear that it charges the appellant with concealing from the Trustee in Bankruptcy property belonging to the estate of the bankrupt, although the exact words of the statute were not followed. *Pallett* v. *United States*, 228 F. (2) 671, 672, C. A. 5th; *Rule 52(a), Rules of Criminal Procedure.*

With respect to the merits of the case, the evidence showed the following. A Receiver was appointed for the Detroit Central Wholesale Grocery Company, who took possession of the premises on December 27, 1949.* He made a physical inventory of the assets on the premises as of the time they were taken over by him, which was in the amount of $57,690.11. The Company was adjudicated a bankrupt on January 27, 1950. A Trustee in Bankruptcy was appointed, who qualified on March 4, 1950. He received the books and records from the Receiver and took over the bankrupt estate. The books showed an inventory of $184,320.66 at the close of the fiscal period April 30, 1949. An examination of the books and records was made for the Receiver by an accountant, Duffield, and for the Trustee by an F. B. I. Agent-Accountant, Berglund. In making his examination and analysis of the affairs of the bankrupt, Berglund also interrogated certain employees and other persons who had done business with the bankrupt. The Government relied mainly in presenting its case upon the testimony of Duffield and Berglund who stated what their respective examinations disclosed. The books and records which formed the basis for their testimony were introduced in evidence and made available for inspection and examination and for use in cross-examination. Under the general well settled rule, their testimony was admissible and was properly received in evidence. *United States* v. *Johnson*, 319 U. S. 503, 519; *United States* v. *Marachowsky*, 201 F. (2) 5, 18, C. A. 7th, cert. denied, 345 U. S. 965; *Hoyer* v. *United States*, 223 F. (2) 134, 138, C. A. 8th.

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* There is some testimony that this date was December 24, 1949. We consider the conflict immaterial.

Duffield testified that he considered the inventory on hand on April 30, 1949, to which he added purchases in the amount of $703,361.66 during the period from May 1, 1949, to the close of business on December 27, 1949, making a total of $887,682.32 of merchandise available for sale. For the same period there were total sales in the amount of $732,009.71. He reduced the sales to cost by deducting a markup of 6.7 per cent of cost, based on other evidence hereinafter referred to, resulting in the figure of $682,-965.06. The sum of the inventory on hand at the close of business and the amount of sales for the period of May 1, 1949, through December 27, 1949, namely, $740,655.17, represented the total merchandise accounted for. He subtracted this from the total merchandise available for sale, $887,682.32, to determine the amount of merchandise not accounted for. The resulting shortage was $147,027.15.

Appellant criticises Duffield's analysis and resulting conclusion in that it admittedly was an examination and analysis of the books as he found them, rather than a certified audit, and that the witness included in his written report important cautionary observations. These were, that it had been the consistent practice of the Company to record, by adjusting journal entries, at year-end closing dates, certain previously unrecorded cash sales receipts; that any unrecorded cash sale receipts would materially affect the inventory difference; and that "Since the date of this examination is not a year-end closing date no similar adjusting journal entries appear on the books. Based upon the consistent practices and the pattern set by the Company in prior periods, it is our opinion that the inventory difference represents unrecorded transactions for which proper accounting has not been made on the books." On cross-examination, the witness admitted that if such sales had been made and no accounting had been made of them on the books "obviously, that would be a type of entry or transaction that would partially account for, or I should say account for, any difference in inventory."

Such criticism has considerable merit. But it goes to the weight of the evidence, not to its admissibility. Book entries, which on their face are apparently bona fide, are

admissible in evidence, although, of course, not conclusive. *Woodworth* v. *Commissioner*, 218 F. (2) 719, 723, C. A. 6th; *Martins Fork Coal Co.* v. *Harlan-Wallins Coal Corp.*, 83 F. (2) 967, 970, C. A. 6th. Compare: *Hopkins* v. *Osborne*, 278 Ky. 229. The testimony of the witness was based on the books as kept by the bankrupt. They were the best and most complete evidence available. The extent to which they were incomplete was chargeable to the appellant. The opportunity was available to him to explain or supplement what they disclosed. Compare: *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills, Inc.*, 147 F. (2) 209, 214-215, C. A. 3rd; *Doll* v. *Glenn*, 231 F. (2) 186, 188, C. A. 6th. In the absence of impeaching or supplemental evidence on the part of appellant, the jury was entitled to consider this evidence, giving to it such weight as they considered proper in the light of appellant's criticism thereof.

Duffield also testified about a journal entry deemed by him deserving of special attention because of its unusual nature. The journal entry was dated April 30, 1949, and consisted of a debit to an account on the books called "Loan, Receivable, Ben J. Rudin," with the explanation, "To set up loans made by Mr. Rudin to pay personal debts assumed from corporation in August 1947." It was entered as a credit to the "Cash Sales Account." In the opinion of the witness, there was no correlation between the two entires of 1947 and 1949. He testified that he could not trace any of the funds for the loan accounts, and from the manner in which the entry was made, he was of the opinion that the money flowed into the corporation by virtue of cash sales but never reached the coffers of the corporation and was appropriated by the appellant by this entry in satisfaction of his using those funds to pay off debts which he claimed to have assumed in 1947. However, there was testimony showing that three of the debts or loans referred to by the entry, totaling $34,900.00, were either false or repaid by merchandise of the bankrupt.

Berglund, the F. B. I. accountant, also started with the beginning inventory of May 1, 1949, and added to it the

total purchases for the period of May 1, 1949, through December 27, 1949, to determine the amount of merchandise to be accounted for. He added to the inventory on hand at the close of business the cost of sales during the period to determine the amount of merchandise that was accounted for. However, he made certain adjustments in the total purchases and also in total sales by reason of certain sales returns. In computing total sales, he made three separate findings, (1) assuming all sales had been made at cost, which resulted in a merchandise shortage of $97,221.10, (2) using a 5% markup established by interviewing various salesman and employees of the bankrupt, which increased the shortage to $132,077.51, and (3) using the gross profit markup on cost of 3.75 per cent, with a resulting shortage of $123,678.37, which was the amount charged in the indictment. The claimed incompleteness of the books upon which this testimony was based has been previously referred to and discussed. Its weight was a question for the jury.

The Government also introduced testimony concerning transactions between the bankrupt and three different companies, Supreme Wholesale Grocery Company, 3 G's Wholesale Foods Company, and General Tobacco and Grocery Company. During the period from May 1, 1949, through December 27, 1949, the books of the bankrupt contained entries of purchases by the bankrupt from Supreme in the amount of $71,839.72, although sales by Supreme to the bankrupt as shown by the books of Supreme were only $23,254.92. The Government contended that by charging this excess amount of $48,584.80 to an expense account, such as purchases, the appellant avoided the need to account for this amount as income to the bankrupt.

Appellant challenged the accuracy of the entries in Supreme's books by reason of claimed adjustments not reflected by Supreme's books and by the contention that it was just as possible for the books of Supreme to be incorrect as it was for the books of the bankrupt to be incorrect. Appellant contends it was error on the part of the District Judge in permitting the witness Johnson, a certified public accountant, who had five years experi-

ence in assisting the personnel of Supreme in completing the mechanics of bookkeeping and preparation of tax returns, to give his opinion, based on his knowledge of the books of Supreme, that the $48,584.90 was to be more properly considered as an overstatement of purchases by the bankrupt rather than an understatement of sales on the books of Supreme. Johnson gave his reasons for expressing such an opinion.

Although opinions and conclusions by the usual non-expert witness are objectionable as attempting to invade the province of the jury, such testimony by one who has particular training and experience in a special field of activity with which the usual juror is to a large extent unfamiliar, is admissible for the consideration of the jury to assist it in reaching its verdict, it being recognized, of course, that such opinions and conclusions are not binding on the jury and are to be given such weight as the jury in its judgment thinks they should be accorded. *Detroit, T. & I. R. Co.* v. *Banning*, 173 F. (2) 752, 756, C. A. 6th; *People's Gas Co. of Ky., Inc.* v. *Fitzgerald*, 188 F. (2) 198, 201, C. A. 6th. The evidence was properly admitted. The District Judge was not in error in submitting this issue for the consideration of the jury.

Berglund also testified about unrecorded sales on the bankrupt's books to 3 G's Wholesale Grocery Company, supported by invoices and checks, and an unrecorded sale of $1,224.00 to General Tobacco and Grocery Company, supported by an invoice and a cancelled check in payment thereof. If Berglund's testimony about the transactions with Supreme Wholesale Grocery Company and these two customers was accepted by the jury, it resulted in cash unaccounted for in the amount of $66,013.30. This constituted that much of the total shortage of $123,678.37, leaving $57,665.07 of merchandise still unaccounted for. These respective amounts of unaccounted for cash and merchandise were the amounts charged in the indictment.

Witness Jakubowski, employed by the bankrupt as accounts receivable bookkeeper and cost clerk, testified that he received the information which he recorded, from the appellant, that he kept the records as accurately as possible

to the best of his ability, and that he would submit a cost list of items to appellant who would pencil thereon the suggested selling price. The markup was usually six or seven per cent, sometimes, ten per cent. This witness also testified that on one occasion he made a cash deposit of $1,000.00 in a bank account in the name of Mrs. Rudin, who was an inactive employee. He remained employed on the premises of the bankrupt, and on one occasion while he was working on the invoice payroll records for the year, he received a telephone call from the appellant who said he was at his lawyer's place of business and asked Jakubowski to throw the books out the window and bring them down to him.

The Government also introduced evidence that during the period of May 1, 1949, through December 1949, appellant made deposits in his personal bank account of $30,787.18, of which $18,625.00 was cash, and that appellant's wife made deposits in her personal bank account of $160,825.98, of which $134,042.00 was cash. Appellant maintained a safety deposit box, to which access was given him according to the records of the bank on fourteen different occasions during the period under consideration. There was also other evidence on behalf of the Government, which we believe it is unnecessary to review.

Appellant's testimony in his own behalf, in our opinion, failed to rebut the reasonable inferences to be drawn by the jury from the Government's evidence hereinabove reviewed. Such evidence was sufficient to take the case to the jury and sustain the verdict. *Battjes* v. *United States*, 172 F. (2) 1, 5, C. A. 6th; *United States* v. *Knight*, 336 U. S. 505, 508.

The judgment is affirmed.